Supreme Court, U. S.
FILED
NOV 20 1979

No. 79-429

In the
Supreme Court of the United States
October Term, 1979

LUCKY STORES, INC.,
A CALIFORNIA CORPORATION,
Petitioner,

vs.

VILLAGE OF LOMBARD,
A MUNICIPAL CORPORATION,
Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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ARGUMENT FOR DENIAL OF THE WRIT

The Petition for Writ should be denied. The decision of the Court of Appeals was fundamentally correct and consistent with the many cases wherein the Supreme Court has determined the applicability of *Railroad Commission of Texas* vs. *Pullman,* 312 U.S. 496 (1941). Respondent submits that the reasoning underlying these cases applies with full force when a federal plaintiff is in district court solely on the basis of diversity jurisdiction.

I.

ABSTENTION WAS APPROPRIATE BECAUSE THIS CASE INVOLVES MATTERS PECULIARLY WITHIN THE STATE'S POLITICAL INTEREST, AS DELEGATED TO THE MUNICIPALITY.

As Lucky stated in its Petition at 4, the underlying controversy in this case concerns the applicability of Lombard's sign ordinance to Petitioner's sign, and specifically, whether Lucky's change of lettering on the sign rendered the sign an illegal nonconforming use.

Lombard submits that this question is one appropriately decided by Illinois courts, not by a federal district court, even one sitting in diversity and bound to apply Illinois substantive law. As this Court stated in *City of Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168 (1942), in a case involving the construction of a City of Chicago ordinance and an Illinois law regulating the sale of milk in paper cartons,

> We are of the opinion that the procedure which we followed in the *Pullman* case should be followed here. *Illinois has the final say as to the meaning of the ordinance in question.*
>
> • • •
>
> The determination which the District Court, the Circuit Court of Appeals, or we might make could not be anything more than a forecast—a prediction as to the ultimate decision of the Supreme Court of Illinois.

Id. at 171-2 (emphasis added). This Court then remanded the cause to the District Court with directions to abstain pending a state court determination.

Likewise, the question of whether Lucky's change of lettering rendered its sign an illegal nonconforming use is

properly a state issue, to be properly resolved by Illinois courts.

II.

FEDERAL COURT ABSTENTION IN A PURE DIVERSITY CASE SEEKING RELIEF AGAINST A MUNICIPAL ORDINANCE IS APPROPRIATE.

The nub of the issue before this Court is whether the parameters of *Pullman* and its progeny encompass matters before a federal district court solely on diversity grounds. Lombard submits that they do.

The considerations underlying *Pullman* abstention are avoidance of needless friction between state and federal governments, and husbanding of federal courts' equity jurisdiction. Diversity jurisdiction is predicated, on the other hand, on a *suspicion* of bias on the part of state courts toward out-of-state plaintiffs. This suspicion, while perhaps justified in an earlier era, has come under attack in recent years because of a general recognition of the increased sophistication of state courts. As the Seventh Circuit noted in its opinion, reproduced as Appendix B in Lucky's Petition, the intersection of the doctrines of *Pullman* abstention and of diversity jurisdiction has been treated before. See pp. A8-A11 of Lucky's Petition.

The question, therefore, is whether a party seeking declaratory and injunctive relief against the enforcement of a municipal ordinance on non-constitutional grounds is entitled to seek such relief from a federal district court, or whether that party should be remanded to its state court remedies.

Lombard submits that, since Lucky has called upon the district court's equity jurisdiction, considerations of equity

should prevail. Simply stated, if federal plaintiffs with federal *constitutional* claims can be directed to proceed in state courts for relief against enforcement of state and local laws, then a federal plaintiff with *no* constitutional claims, federal or state, should have no greater right to a federal forum.

III.

LUCKY WAS PROPERLY DENIED LEAVE TO AMEND ITS COMPLAINT.

In *Sarfaty* vs. *Nowak*, 369 F.2d 256 (7th Cir. 1966), a civil rights suit for injunctive relief against the enforcement of a municipal ordinance, the trial court's denial of plaintiffs' petition for leave to amend their complaint, on the ground that they could not have avoided the abstention doctrine by amendment was upheld. The Seventh Circuit, in a decision foreshadowing *Younger* vs. *Harris*, 401 U.S. 37 (1971), noted that:

> In the present case, no First Amendment rights are involved, no similar history of official harassment is alleged, and the local ordinance . . . deals with an area . . . traditionally subject to substantial state regulation.
>
> • • •
>
> No amendment, no matter how phrased, could be presented that would avoid the doctrine of abstention . . . .

369 F.2d at 259.

Lombard therefore contends that the district court's denial of leave to amend in the instant case was proper. To be noted is the fact that Judge Crowley was in a peculiarly apt position to rule on this issue, having represented the disappointed plaintiffs in *Sarfaty* on appeal.

CONCLUSION

The question of the applicability of the *Pullman* doctrine in a diversity setting has been discussed by this Court many times. The doctrine provides an adequate ground for the District Court's ruling in the instant case, and there is thus no reason for this Court to consider whether the *Younger* doctrine may apply in diversity as well.

For the reasons stated above, Respondent respectfully requests that Petitioner's application for a writ of certiorari be denied.

Respectfully submitted,

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